

Aneco, Inc. and International Brotherhood of Electrical Workers Local Union No. 606, AF-CIO.
Case 12-CA-15738

March 20, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On February 27, 1998, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ in which it found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicant Winston Cox. As a remedy for this violation, the Board ordered the Respondent to offer Cox employment in the same or a substantially equivalent position for which he applied and to make him whole for any losses suffered as a result of the Respondent's discrimination against him. On June 15, 1998, the Respondent executed a stipulation waiving its rights under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying that Order. The stipulation further provided for a compliance hearing to resolve any disputes concerning the amount of backpay due under the terms of the Board's Order.

A controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 12 issued a compliance specification and notice of hearing on May 28, 1999, alleging the amount of backpay due and notifying the Respondent that it must file an answer complying with the Board's Rules and Regulations. The specification, *inter alia*, alleges that the backpay period should run from July 12, 1993, to April 1, 1998, and that gross backpay should be calculated using the average weekly regular and overtime hours and wage rates of comparator journeyman electricians employed by the Respondent. The specification excludes nine calendar quarters from the Respondent's gross backpay liability, but also alleges that Cox incurred no interim earnings during the backpay period which would reduce the backpay owed to him.

On June 15, 1999, the Respondent filed an answer to the specification. By letter dated July 16, 1999, the General Counsel notified the Respondent that it deemed the answer inadequate. In response, the Respondent filed an amended answer (the amended answer) admitting in part and denying in part the allegations in the specification and raising several affirmative defenses.

On October 25, 1999, the General Counsel filed with the Board a Motion to Strike Respondent's Amended Answer in Part and for Partial Summary Judgment.² On

October 27, 1999, the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On December 10, 1999, the Respondents filed a memorandum in opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion to Strike the Respondent's Amended Answer in Part and for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states, in pertinent part:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

¹ 325 NLRB 400.

² The General Counsel contends that the amended answer to the backpay specification is substantively deficient, except with respect to par. 3 of the specification (which excludes several quarters from the backpay period) and the matters relating to Cox's interim earnings set

forth in pars. 8–11 of the specification. Accordingly, the General Counsel does not seek summary judgment with respect to these paragraphs.

A. Definition of Gross Backpay

1. Positions of the parties

Paragraph 1 of the specification alleges that “[t]he gross backpay due Winston J. Cox is the amount of earnings he would have received but for the discrimination against him.” In its amended answer, the Respondent denies the gross backpay definition in paragraph 1 of the specification and asserts that gross backpay is “the amount of earnings Cox would have received . . . offset by the amount of earnings [he] made or should have made in a reasonable attempt to mitigate economic damages.” The General Counsel argues that the language of the Respondent’s answer essentially admits the Board’s definition of gross backpay as set forth in paragraph 1.

2. Analysis and conclusions

We agree with the General Counsel that the Respondent’s answer regarding the definition of “gross backpay” constitutes an admission. The specification clearly states that gross backpay is a preliminary figure, which would be reduced by any interim earnings.³ Accordingly, we shall strike those portions of the Respondent’s amended answer denying the gross backpay definition and grant the Motion for Summary Judgment with regard to paragraph 1 of the specification.

B. Duration of the Gross Backpay Period and Appropriate Comparator Position

1. Positions of the parties

Paragraph 2 of the specification alleges that “[t]he backpay period for Cox commences on July 12, 1993 when he was discriminatorily denied employment as a journeyman electrician by the Respondent, and ends on April 1, 1998, when he received an offer of employment from the Respondent.” Paragraphs 4, 5, 6, and 7 of the specification set forth computations for the gross backpay and net backpay owed by utilizing the average weekly regular and overtime hours and wage rates earned by the Respondent’s journeymen electricians.⁴

In its amended answer, the Respondent denies that any backpay is due and generally denies the allegation regarding the duration of the backpay. The Respondent admits that it made an unconditional offer of employment to Cox on April 1, 1998, but asserts that the backpay period should be limited to the period from the alleged discriminatory event until the time that Cox would have left its employment when he had either successfully organized the Respondent’s employees or conceded the futility of doing so. The Respondent further asserts that this time period would not have exceeded 2 weeks after he started his employment with the Respondent. The

³ Any issues as to Cox’s interim earnings will be litigated at the compliance hearing.

⁴ These hours and wage rates are set forth in appendices A-1–A-10 of the specification and summarized in appendix C.

Respondent also denies the specification’s computation of the gross backpay on the basis that the appropriate comparator position is electrician helper and not journeyman electrician. The Respondent states that since Cox was seeking work either as an electrician helper or journeyman electrician and since he had been out of the trade for an extended period, helper would have been Cox’s “logical starting position.” Therefore, the Respondent contends that backpay should be calculated using the wages paid to the Respondent’s electrician helpers.⁵

The General Counsel argues in its motion that the amended answer’s responses to paragraphs 2, 4, 5, 6, and 7 are inappropriate inasmuch as they raise matters already decided by the underlying unfair labor practice decision. With regard to the opening date for the backpay period, the General Counsel notes that the Respondent gives no explanation, or alternative starting date, despite the information both being within its knowledge and already having been determined by the underlying decision. As to the closing date of the backpay period, the General Counsel argues that the Respondent’s unconditional offer of employment indicates on its face that it was received on April 1, 1998. Finally, with regard to the proper comparator position, the General Counsel argues that both the underlying unfair labor practice decision and the Respondent’s unconditional offer of employment indicates that the position sought was an electrician’s position.

In its opposition to the motion, the Respondent acknowledges that backpay normally terminates upon an offer of reinstatement, but argues that in the instant case, backpay can be tolled at an earlier point. The Respondent asserts that the date when Cox would have left the Respondent’s employment is an open question that has not been decided in the underlying unfair labor practice proceedings. Finally, the Respondent argues that the proper comparator position should be electrician helper and not journeyman electrician since “electrician” as used in the underlying unfair labor practice decision could have referred to any electrical position with the Respondent.

2. Analysis and conclusions

We agree with the General Counsel that the Respondent’s general denial regarding the starting date of the backpay period is substantively deficient. The Respondent gave no explanation of its denial of July 12, 1993, as the appropriate starting date of the backpay period and did not submit an alternative date despite the information being clearly within the Respondent’s knowledge. *Nephi Rubber Products Corp.*, 312 NLRB 297 (1993). As such, Section 102.56 requires that this allegation be deemed admitted as true. Moreover, the date of the dis-

⁵ The Respondent otherwise admits that the specification’s computations in appendices A-1–A-10 and C would be accurate if journeyman electrician was the appropriate comparator.

criminary refusal to hire, which constitutes the opening date of the backpay period, has already been litigated and adjudicated in the unfair labor practice proceeding and cannot be relitigated in a compliance proceeding. *Quality Hotel*, 323 NLRB 864, 865 (1997). See also *Transport Service Co.*, 314 NLRB 458, 459 (1994).

As to the ending date of the backpay period, however, we shall deny the General Counsel's motion.⁶ The Respondent acknowledges that it made an unconditional offer, but alleges an alternative date and basis as to when the backpay period would end. We find this answer sufficiently specific to raise a litigable issue of fact regarding the closing date of the backpay period and that this issue is best resolved by a hearing. *Bardaville Electric Co.*, 315 NLRB 759, 760 fn. 9 (1994).

With regard to the comparator position for determining the amount of gross backpay due, we agree with the General Counsel that, in the underlying unfair labor practice proceeding, the Board found that Cox had applied for an electrician position and not the helper position. *Aneco, Inc.*, 325 NLRB 400, 404 (1998). Therefore, we find that this issue has been litigated and decided in the underlying unfair labor practice proceeding and cannot now, especially in light of the Respondent's stipulation, be relitigated in the ensuing backpay proceeding. *Transport Service Co.*, supra.⁷

For the reasons stated above, we will strike those portions of the Respondent's amended answer regarding the duration of the backpay period, except as to the closing date, and regarding the computation of gross backpay based on the comparator position of journeyman electrician.⁸ We shall grant the Motion for Summary Judgment

⁶ To the extent, however, that the Respondent's answer alleges, as an affirmative defense, that Cox was not genuinely seeking employment because he was a "tester," we shall grant the General Counsel's motion to strike. This issue was resolved in the unfair labor practice proceeding and cannot be relitigated in the compliance stage.

⁷ Member Hurtgen would deny the General Counsel's motion in this respect. In the underlying case, the Board decided that Cox was unlawfully denied employment to the position of electrician. The Respondent asserts that there are two kinds of electricians—journeyman and helper and that, irrespective of union activity, Cox would have been hired only as a helper. If that is so, backpay would be at the lower helper rate. Member Hurtgen would permit the Respondent to make a showing as to that factual issue.

⁸ The General Counsel also seeks to strike those portions of the Respondent's answer denying generally that Cox is due backpay or that it has an obligation to make him whole. In its opposition, the Respondent concedes that the Board's standard remedy is to provide backpay to make discriminatees whole for injury suffered as a result of that discrimination, but reiterates its assertions that Cox has either fully mitigated his losses or failed to make a reasonable effort to do so and that the backpay period has been tolled at an earlier date. We agree with the General Counsel that the Respondent cannot generally deny its backpay obligation that has been decided by the Board. Accordingly, we shall strike the portions of the Respondent's amended answer contesting this obligation and deem that the Respondent has admitted its general obligation

with respect to the compliance specification's paragraph 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, 7, and those portions of paragraphs 10 and 11 related to the Respondent's general backpay obligation.

Conclusion

In sum, we shall strike the Respondent's amended answer to the compliance specification's paragraphs 1, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, 7, and the "make-whole" portions of paragraphs 10 and 11. We shall also strike those portions of the amended answer's affirmative defenses relating to Cox's being a "tester." We shall grant summary judgment with respect to the compliance specification's paragraphs 1, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, 7, and those portions of paragraphs 10 and 11 related to the Respondent's general backpay obligation.

ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted as to the allegations contained in the compliance specification's paragraphs 1, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, and 7, and those portions of paragraphs 10 and 11 related to the Respondent's general backpay obligation except insofar as those allegations relate to interim earnings.

IT IS FUTHER ORDERED that the General Counsel's motion to strike is granted as to the Respondent's amended answer to the compliance specification's paragraphs 1, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, 7, the "make-whole" portions of paragraphs 10 and 11, and the affirmative defense regarding Cox's status as a "tester" insofar as it challenges Cox's status as a bona fide applicant except as those allegations relate to interim earnings.

IT IS FUTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for the purposes of issuing a notice of hearing and scheduling a hearing before an administrative law judge, for the taking of evidence concerning the remaining allegations of the compliance specification.

IT IS FUTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

gation to pay backpay to discriminatee Cox as alleged in par. 11 of the compliance specification.